JOCELINE TAN POH CHOO & ORS A

v.

V MUTHUSAMY

FEDERAL COURT, PUTRAJAYA B
NIK HASHIM FCJ
AUGUSTINE PAUL FCJ
ZULKEFLI MAKINUDIN FCJ
[CIVIL APPEAL NO: 02-4-2004(P)]
7 NOVEMBER 2008 C

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Rehearing of appeal - Propriety of questions posed - Courts of Judicature Act 1964, s. 96(a) - Rules of the Federal Court 1995, r. 137*

D

This was the rehearing of the appellants' appeal earlier allowed by the Federal Court upon the respondent's application for a review of the judgment under r. 137 of the Rules of the Federal Court 1995. The facts were that the respondent brought an action against the appellants for an alleged defamatory report about him E published in the local newspaper. The issue for consideration was the propriety of the question posed before the court for the purpose of an appeal pursuant to s. 96(a) of the Courts of Judicature Act 1964 that were in two parts: (a) whether a fair and accurate report of the proceedings publicly heard before the High F Court may include an extract of the pleadings; and (b) and if so, whether the pleadings should first be read out in the course of the proceedings before publication can be made of the pleading.

Held (dismissing the appeal):
Per Augustine Paul FCJ delivering the judgment of the court: G

(1) Part (a) of the question was based on an assumption that the report was fair and accurate when the Court of Appeal made no specific finding on that vital ingredient to be proved in the defence of absolute privilege. A question posed must relate to H a matter upon which a determination has been made by the court. As that was not the position in the present case, that part of the question, as framed, was irregular. As to the inclusion of an extract of the pleadings in the report, it was implicit that the Court of Appeal ruled it could be included I

A subject to fulfillment of the requirement in part (b) of the question. That aspect of the question was therefore unnecessary. (para 13)

(2) Part (b) of the question was in order as it sought to reverse
B a specific finding made by the Court of Appeal. Thus the court could answer only part (b) of the question. But it must be immediately realised that an answer to that part of the question in favour of the appellants would not have the effect of reversing the judgment of the Court of Appeal as the
C critical question as to whether the report was fair and accurate remained unanswered. Such an answer was a prerequisite in order for the appellants to succeed in the defence of absolute privilege as provided by s. 11(1) of the Defamation Act 1957. In short, the answer would only be of
D academic value as it would not affect the position of the appellants. It was thus not a proper exercise of authority for the court to engage itself in answering the question as framed. (para 13)

E ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah pendengaran semula rayuan terdahulu perayu yang dibenarkan oleh Mahkamah Persekutuan ekoran permohonan responden untuk kajian semula di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995. Faktanya adalah bahawa responden
F telah memulakan guaman terhadap perayu berkaitan satu laporan dalam sebuah akhbar tempatan yang dikatakan memfitnahi responden. Isu yang perlu dipertimbangkan adalah mengenai kewajaran soalan yang dikemukakan di hadapan mahkamah bagi maksud rayuan di bawah s. 96(a) Akta Mahkamah Kehakiman
G 1964 yang dipecah kepada dua persoalan berikut: (a) sama ada satu laporan yang adil dan benar mengenai prosiding yang didengar secara terbuka oleh Mahkamah Tinggi boleh mengandungi petikan-petikan dari pliding; dan (b) jika begitu, sama ada pliding harus terlebih dahulu dibaca semasa perjalanan prosiding sebelum
H penyiarannya boleh dibuat.

Diputuskan (menolak rayuan):
Oleh Augustine Paul HMP menyampaikan penghakiman mahkamah:

I **(1)** Bahagian (a) soalan adalah berasaskan andaian bahawa laporan adalah adil dan benar sedangkan Mahkamah Rayuan tidak membuat sebarang dapatan spesifik berkaitan ingredien penting

yang perlu dibuktikan dalam pembelaan keistimewaan mutlak. Soalan yang dikemukakan hendaklah menyentuhi perkara di mana keputusan mengenainya telah dibuat oleh mahkamah. Oleh kerana ini bukanlah keadaannya yang wujud di sini, maka bahagian yang berkenaan soalan, seperti yang dirangka, adalah tidak teratur. Mengenai soal memasukkan petikan pliding ke dalam laporan, adalah jelas bahawa Mahkamah Rayuan telah memutuskan ianya boleh dimasukkan tertakluk kepada pematuhan syarat bahagian (b) soalan. Aspek soalan tersebut dengan itu adalah tidak perlu.

(2) Bahagian (b) soalan adalah teratur kerana ia memohon untuk mengakas satu dapatan spesifik yang dibuat oleh Mahkamah Rayuan. Mahkamah dengan itu hanya boleh menjawab bahagian (b) soalan. Namun, harus disedari segera bahawa jawapan kepada bahagian soalan tersebut yang memanfaatkan perayu pun tidak memberi kesan mengakas keputusan Mahkamah Rayuan oleh kerana soalan penting mengenai sama ada laporan tersebut adil dan benar masih tidak terjawab. Seperti yang diperuntukkan s. 11(1) Akta Fitnah 1957, jawapan sedemikian adalah syarat duluan kepada kejayaan perayu dalam sesuatu pembelaan keistimewaan mutlak. Dengan kata lain, jawapan hanya mempunyai nilai akademik dan tidak memberi apa-apa kesan terhadap kedudukan perayu. Oleh itu, bukanlah satu pelaksanaan kuasa yang teratur untuk mahkamah bersusah payah menjawab soalan seperti yang dirangka.

Case(s) referred to:

Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713 FC ***(refd)***

Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***

Kredin Sdn Bhd v. OCBC Bank (Malaysia) Bhd [1998] 2 CLJ 797 FC ***(refd)***

Lim Geak Liang v. East West UMI Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***

Loknath Padhan v. Birendra Kumar Sahu AIR [1974] SC 505 ***(refd)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***

Raphael Pura v. Insas Bhd & Anor [2003] 1 CLJ 61 FC ***(refd)***

Sri Kelangkota – Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***

Sun Life Assurance Co of Canada v. Jervis [1944] 1 All ER 469 ***(refd)***

Tan Heng Chew & Ors v. Tan Kim Hor & Ors [2006] 3 CLJ 481 FC ***(refd)***

The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [2008] 3 CLJ 221 FC ***(refd)***
The Minister for Human Resources v. Thong Chin Yoong and Another Appeal [2001] 3 CLJ 933 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Defamation Act 1957, s. 11(1)
Rules of the Federal Court, r. 137

For the appellants - JA Yeoh; M/s Shearn Delamore & Co
For the respondent - Dato' V Muthusamy; M/s V Muthusamy & Assoc

[Appeal from Court of Appeal; Civil Appeal No: P-02-854-2000]

[Editor's note: For the Court of Appeal judgment, please see Joceline Tan Poh Choo & Ors v. Muthusamy [2003] 3 CLJ 705.]

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul FCJ:

[1] This appeal raises for consideration the nature and manner in which questions ought to be framed for the purpose of an appeal to this court pursuant to s. 96(a) of the Courts of Judicature Act 1964 ("s. 96(a)").

[2] This appeal was previously heard by this court which had, on 13 May 2005, allowed the appeal of the appellants with costs. Upon an application for a review of the judgment by the respondent under r. 137 of the Rules of the Federal Court the orders made were set aside and the appeal was ordered to be reheard. This is the rehearing of the appeal. The first, second and third appellants are the staff reporter, editor and publisher respectively of The New Straits Times. The respondent is an advocate and solicitor practising under the name and style of Messrs V. Muthusamy & Co and was at one time a member of the Penang State Assembly.

[3] The appellants published a report entitled "Lawyer and trader conspired to cheat me, claims driver" in *The New Straits Times* on 12 September 1991. The report reads as follows:

PENANG, Wed. – A lawyer allegedly conspired to cheat an illiterate man who had engaged him to facilitate the purchase of a property in Kulim, Kedah, the High Court was told today. A

Driver G. Paramasevam claimed that his lawyer V. Muthusamy had breached their contract by allowing the land, worth $70,0000, to be transferred to a businessman nine years ago without his knowledge or permission. B

He said that when he demanded an explanation from Mr Muthusamy, the lawyer claimed he did not know anything and asked him to leave his office. C

He has named in his suit, businessman Varlivell alias V. Vadiveloo as the first defendant and Mr Muthusamy as the second defendant.

He claimed he was cheated of the property as a result of the conspiracy between the two defendants and is seeking an order for the return of his property, damages and costs. D

At the start of today's proceedings, Mr Paramasevam's counsel Mr Karpal Singh objected to Mr Muthusamy's dual roles as both counsel and defendant in the case. Mr Muthusamy who is represented by Mr Yeap Ghim Guan, is representing Mr Vadiveloo. E

However, Mr Muthusamy assured Mr Justice Mohamed Dzaiddin Abdullah that there would be no complications. He also complained to the court that "several reporters have got hold of the case documents and that is why they have all come here today". F

In his testimony, Mr Paramasevam said he and Mr Vadiveloo were former business partners in Singapore before his return to Penang in 1982. G

They had a falling out after he asked Mr Vadiveloo, who is married to his sister's daughter, for the return of a $100,000 loan. However, the latter repaid part of the loan in two instalments of $35,000 each after Mr Paramasevam decided to buy the land. H

On Feb 2, 1982, Mr Muthusamy informed me at his office that the vendor had charged the property to Malayan Banking. He asked me to pay a $35,000 deposit and promised to settle the problem with the bank.

"Three weeks later, I visited his office where I was asked to sign an agreement. He also reminded me to pay the balance within six months," he said. I

Mr Paramasevam did this on Aug 18 when Mr Vadiveloo repaid him another $35,000 which he immediately handed over to Mr Muthusamy's office.

When he failed to receive the title to the property after three months, he returned to the legal firm but was only asked to sign three letters and told to wait a while more.

A few days later, I got into financial difficulties and decided to sell the land. I brought a prospective buyer to Mr Muthusamy's office but was told by the clerk that the land did not belong to me.

After confirming this with a literate friend, Mr Paramasevam confronted Mr Muthusamy but was instead scolded and told to get out of the office.

I phoned Vadiveloo and asked him why he had cheated me. He said he would not leave me alone until I become a beggar.

The judge set Nov 30 as the next date of hearing."

The respondent claimed that the report meant and was understood to mean that he was a cheat and a dishonest person and was not fit to practise law and to hold public office. The appellants claimed that they were entitled to rely on the defence of absolute privilege under s. 11(1) of the Defamation Act 1957 ("s. 11(1)").

[4] The learned High Court Judge found that the report was primarily based on the amended statement of claim and was defamatory. It was also his finding that the report was not fair and accurate and not contemporaneous. Accordingly, he ruled that the defence of absolute privilege was not available to the appellants. He then allowed the respondent's claim for defamation and awarded a sum of RM300,000 as general damages and RM50,000 as aggravated damages together with costs and interest. The appellants appealed to the Court of Appeal against the whole of the decision of the High Court while the respondent cross-appealed. The Court of Appeal agreed with the findings of the High Court that the report was defamatory of the respondent. In holding that it was contemporaneous the Court of Appeal then considered the question of whether the report should only be confined to what was publicly heard in open court and not to matters contained in documents filed but not read in open court. It was held that the publication by the appellants of part of the

amended statement of claim which was not read out in open court was not within the scope of the protection given by s. 11(1). Accordingly, the appellants' appeal against liability was dismissed. The award of general damages was reduced to RM100,000 and the award of aggravated damages of RM50,000 was set aside. The appellants were awarded half costs of the appeal and the respondent's cross-appeal was dismissed.

[5] The appellants then filed a notice of motion for leave to appeal to this court as required by s. 96(a). They were given leave to appeal on the following question:

> Whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings and if so, whether the pleadings should first be read out in the course of the proceedings before publication can be made of the pleadings.

The question posed is based on s. 11(1) which reads as follows:

> A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and *bona fide* comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

What is relevant for the purposes of this case is only the first part of the section. In order to succeed on the defence of absolute privilege under this part there must be proof of the following requirements:

(a) The report must be fair and accurate and contemporaneous,

(b) The report must relate to a proceeding publicly heard, and

(c) The proceeding must have been heard before any court lawfully exercising judicial authority within Malaysia.

With regard to requirement (a) the Court of Appeal did not make any finding as to whether the report was fair and accurate though it was found that it was contemporaneous. With regard to requirement (b) it was held that where the report contains

A extracts from pleadings it must have been read out in open court. This means that pleadings can form part of the report subject to the stipulation that it must have been read out in open court. Requirement (c) does not need any proof as judicial notice can be taken of the fact that the proceeding was heard in a court lawfully B exercising judicial authority within Malaysia.

[6] It is against the background of what has been just said in the preceding paragraph, that is to say, the elements that must be proved in order to succeed in the defence of absolute privilege C and the findings of the Court of Appeal thereon, that the questions must be framed in order to satisfy the requirements of s. 96(a) which reads as follows:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal D shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a E question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

In commenting on the criteria to be satisfied in an application for F leave to appeal under s. 96(a) Edgar Joseph Jr FCJ said in *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325 at p 335-336:

> To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to G grant leave to appeal in civil cases sparingly and will not grant such leave unless **both** of the following criteria are satisfied by an intending appellant:
>
> (1) the judgment of the Court of Appeal has raised a point of general principle **which the Federal Court has not H previously decided** or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and
>
> (2) if the point is decided in favour of the intending appellant, I there is a *prima facie* case for success in the appeal. (emphasis added)

It must be observed, and with respect, that the use of the words "… which the Federal Court has not previously decided …" in criterion (1) may not be an accurate representation of s. 96(a). An analysis of the section will make this clear. It contains two circumstances in which an appeal may be made to this court. They are:

Limb (a)

A Question Of General Principle Decided For The First Time

[7] It is obvious that this is a reference to a decision of the Court of Appeal for the first time on a question of general principle. As s. 96(a) deals with appeals from the Court of Appeal to the Federal Court the word "… decided …" in s. 96(a) refers to a decision that has already been made. The use of the word in the past tense makes this manifestly patent. A decision that has been made can only be a reference to a decision of the Court of Appeal.

Limb (b)

A Question Of Importance Upon Which Further Argument And A Decision Of The Federal Court Would Be To Public Advantage

[8] This limb is an unambiguous reference to an issue upon which there have been two or more previous decisions of the Court of Appeal. This is made clear by the purpose of limb (a) and the language of this limb itself. A reference to further argument and the fact that a decision of the Federal Court would be to public advantage has in contemplation two or more previous decisions of the Court of Appeal on the same issue which are, for example, in conflict or are wrong or made in ignorance of a binding precedent or made in following a decision of the Federal Court which is vague or wrong. Such a situation would create confusion to the public in the application of the legal principle involved to their affairs. In that event further argument and a decision of the Federal Court on the issue involved would be to public advantage as the confusion would be resolved.

[9] It is thus clear that both limb (a) and limb (b) are separate and as they cater for two distinct circumstances they are mutually exclusive. It is now appropriate to consider the use of the words "… which the Federal Court has not previously decided …"

A referred to earlier in the passage from *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325 in limb (a). It will be recalled that the reference in that limb to the decision made for the first time is to that of the Court of Appeal. It is true that the fact that the
B Federal Court has not previously decided on a point may mean that it is also the first time that the Court of Appeal has decided on the point as contemplated by limb (a). But, unfortunately, it can also mean that the Court of Appeal has decided on the point previously and that the Federal Court has not decided on it yet
C thereby making it a case upon which the Federal Court has not previously decided. It is clear by now that limb (b) becomes relevant only when there are two or more decisions of the Court of Appeal on a certain point. Thus the use of the words "... which the Federal Court has not previously decided ..." in limb
D (a) in *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325 will create confusion in the proper meaning to be accorded to both the limbs. They ought to be replaced with the words "... decided by the Court of Appeal for the first time ..." as contemplated by s.
E 96(a). That will remove any confusion that may arise and, additionally, bring into proper focus the underlying distinction between both the limbs.

[10] In an application for leave to appeal an intending appellant
F must identify the proper limb under which his case falls and address the arguments accordingly.

[11] The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there
G is a *prima facie* case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant
H without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this court
I subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v. OCBC Bank (Malaysia) Bhd* [1998] 2 CLJ 797). Leave to appeal on a proposed question will therefore not be

granted if there is no hope of success (see *Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713). This is logical. If the answer to the proposed question is obvious in the sense that it will not be in favour of the intending appellant there will be no basis for a *prima facie* case for success in the appeal. Where a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325). The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal as otherwise it will be academic (see *The Minister for Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 3 CLJ 933 and *Raphael Pura v. Insas Bhd & Anor* [2003] 1 CLJ 61). It follows that a question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405). Needless to say, the parties may by consent reframe or amend the question at the hearing stage of the appeal with the approval of the court as demonstrated in *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 3 CLJ 221.

[12] The corollary is that if there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. In *Sun Life Assurance Co of Canada v. Jervis* [1944] 1 All ER 469 Viscount Simon LC said at p 470:

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

In *Loknath Padhan v. Birendra Kumar Sahu* AIR [1974] SC 505 Bhagwati J said at p 508:

> If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the Court to engage itself in deciding it. … It would be clearly futile and meaningless for the Court to decide an academic question, the answer to which would not affect the position of one party or the other. The Court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the Court would properly decline to do so.

Thus this court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted with the result that the appeal must be dismissed without a consideration of its merits. This is demonstrated by cases such as *The Minister for Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 3 CLJ 933, *Raphael Pura v. Insas Bhd & Anor* [2003] 1 CLJ 61, *Sri Kelangkota – Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349, *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787 and *Tan Heng Chew & Ors v. Tan Kim Hor & Ors* [2006] 3 CLJ 481.

[13] It is now apposite to consider the propriety of the question posed. It is in two parts, that is to say:

(a) Whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings.

(b) And if so, whether the pleadings should first be read out in the course of the proceedings before publication can be made of the pleading.

Part (a) of the question is troublesome. Firstly, it is based on an assumption that the report is fair and accurate when the Court of Appeal had made no specific finding on this vital ingredient to be proved in the defence of absolute privilege. As stated earlier a question posed must relate to a matter upon which a determination

has been made by the court. As that is not the position here this part of the question, as framed, is therefore irregular. Secondly, as to the inclusion of an extract of the pleadings in the report it is implicit that the Court of Appeal has ruled it can be included subject to fulfillment of the requirement in part (b) of the question. This aspect of the question is therefore not necessary. Part (b) of the question is in order as it seeks to reverse a specific finding made by the Court of Appeal. Thus what this court can answer is only part (b) of the question. But it must be immediately realized that an answer to this part of the question in favour of the Appellants will not have the effect of reversing the judgment of the Court of Appeal as the critical question as to whether the report is fair and accurate will remain unanswered. Such an answer is a prerequisite in order for the appellants to succeed in the defence of absolute privilege as provided by s. 11(1). In short, therefore, the answer to the question will only be of academic value as it will not affect the position of the appellants. It is thus not a proper exercise of authority for this court to engage itself in answering the question as framed.

[14] My learned brothers Nik Hashim Nik Ab Rahman FCJ and Zulkefli Ahmad Makinudin FCJ agree with this judgment. In the upshot the appeal is dismissed with costs. Deposit to the respondent on account of taxed cost.